No. 89

In the Supreme Court of the United States

OCTOBER TERM, 1957

KNUT EINAR HEIKKINEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys,
Department of Justice, Washington 25, D. C.

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OPINION BELOW

The opinion of the Court of Appeals (R. 217–228) is reported at 240 F. 2d 94.

JURISDICTION

The judgment of the Court of Appeals (R. 229) was entered on January 17, 1957, and a petition for rehearing was denied on February 4, 1957 (R. 229). The petition for a writ of certiorari was filed on March 6, 1957, and was granted on April 22, 1957 (R. 230, 353 U. S. 935). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether Section 20 (c) of the Immigration Act of 1917, as amended in 1950—imposing criminal

penalties upon an alien ordered deported who shall "willfully" fail to depart from the United States within 6 months or who shall "willfully" fail to make timely application for travel documents—is unconstitutional because it does not provide for a jury retrial of the administrative determination that the alien is deportable.

2. Whether the 1950 statute, imposing penalties on one ordered deported under the 1918 Act "as amended", is inapplicable to petitioner because parenthetical citations of the amendments to the 1918 Act, as set forth in the 1950 enactment, did not cite the 1950 amendment to the 1918 Act.

3. Whether the trial court's instructions on willfulness were correct, and whether the evidence warranted a finding of willfulness.

4. Whether the offense of willful failure to depart is excused where the impossibility of departure is created by the alien's own additional offense of willful failure to apply for the necessary travel documents.

5. Whether there was any abuse of discretion in the sentence.

STATUTES INVOLVED

Section 20 (c) of the Immigration Act of February 5, 1917, as amended (39 Stat. 890, 57 Stat. 553, 64 Stat. 1010; 8 U. S. C. (1946 ed., Supp. IV) 156 (c)), provided in pertinent part:

> Any alien against whom an order of deportation is outstanding under (1) the Act of October 16, 1918, as amended (40 Stat. 1012, 41 Stat. 1008, 54 Stat. 673, 8 U. S. C. 137); (2) the Act of February 9, 1909, as amended (35 Stat. 614, 42 Stat. 596; 21 U. S. C. 171, 174–

175); the Act of February 18, 1931, as amended (46 Stat. 1171, 54 Stat. 673, 8 U. S. C. 156a); or (4) so much of section 19 of the Immigration Act of 1917, as amended (39 Stat. 889–890; 54 Stat. 671–673, 56 Stat. 1044; 8 U. S. C. 155) as relates to criminals, prostitutes, procurers or other immoral persons, anarchists, subversives and similar classes, who shall willfully fail or refuse to depart from the United States within a period of six months from the date of such order of deportation, or from the date of the enactment of the Subversive Activities Control Act of 1950, whichever is the later, or shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure, or who shall connive or conspire, or take any other action, designed to prevent or hamper or with the purpose of preventing or hampering his departure pursuant to such order of deportation, or who shall willfully fail or refuse to present himself for deportation at the time and place required by the Attorney General pursuant to such order of deportation, shall upon conviction be guilty of a felony, and shall be imprisoned not more than ten years: *Provided,* That this subsection shall not make it illegal for any alien to take any proper steps for the purpose of securing cancellation of or exemption from such order of deportation or for the purpose of securing his release from incarceration or custody: *Provided further,* That the court may for good cause suspend the sentence of such alien and order his release under such conditions as the court may prescribe. In determining whether good cause has been shown to justify

releasing the alien, the court shall take into account such factors as (1) the age, health, and period of detention of the alien; (2) the effect upon the national security and public peace or safety; (3) the likelihood of the alien's following a course of conduct which made or would make him deportable; (4) the character of the efforts made by such alien himself and by representatives of the country or countries to which his deportation is directed to expedite the alien's departure from the United States; (5) the reason for the inability of the Government of the United States to secure passports, other travel documents, or deportation facilities from the country or countries to which the alien has been ordered deported; and (6) the eligibility of the alien for discretionary relief under the immigration laws.

Sections 1 and 4 (a) of the Act of October 16, 1918, as amended (40 Stat. 1012, 41 Stat. 1008, 54 Stat. 673, 64 Stat. 1006; 8 U. S. C. (1946 ed., Supp. IV) 137, 137–3 (a)), provided in pertinent part:

> [Sec. 1]. That any alien who is a member of any one of the following classes shall be excluded from admission into the United States:
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> * * * * *
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> (2) Aliens who, at any time, shall be or shall have been members of any of the following classes:
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> * * * * *
>
> (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political

Association, (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt * * *.

* * * * *

Sec. 4. (a) Any alien who was at the time of entering the United States, or has been at any time thereafter, * * * a member of any one of the classes of aliens enumerated in section 1 (2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.

STATEMENT

Petitioner challenges the decision of the Court of Appeals for the Seventh Circuit (R. 229) affirming the judgment of the District Court for the Western District of Wisconsin (R. 179–180), upon the verdict of a jury (R. 179), finding petitioner guilty of willful failure to depart from the United States within six months of the entry of an order of deportation (Count One, R. 1–2) and willful failure to make

timely application for travel or other documents necessary to his departure within that six months period (Count Two R. 2). The pertinent part of the record may be summarized as follows:

Petitioner is an alien born in Finland in 1890. He emigrated to Canada in 1910 and acquired Canadian citizenship. He was admitted to the United States for permanent residence in 1916. Subsequent to 1928, he made numerous departures from and re-entries into the United States without the required travel documents. From 1923 to 1930, he was a member of the Communist Party while in the United States. He spent approximately three years, from 1932 to 1935, in the Soviet Union, returning to the United States in 1935 (R. 174–175, 217–218).

Deportation proceedings were brought against petitioner on the ground of his membership in the Communist Party. The finding of deportability by the Hearing Officer in the deportation proceedings, dated May 4, 1951 (R. 58, 70), was affirmed by the Assistant Commissioner on October 8, 1951 (R. 58, 70), and by the Board of Immigration Appeals (R. 71). It provided for deportation under the Act of October 16, 1918, as amended, because of petitioner's prior membership in the Communist Party (R. 70–71).[1]

On April 30, 1952, the Immigration and Naturalization Service Officer-in-Charge at Duluth, Minnesota,

[1] The deportation proceedings, upon extensive review by the trial judge, were found valid as a matter of law (R. 47, 63–68, 152, 163, 166–167), and this conclusion is not challenged in the questions here presented which relate, instead, to petitioner's contention that a *jury* retrial of the issue of deportability is essential to constitutionality.

notified petitioner by registered mail at Superior, Wisconsin, where petitioner resided, that an order directing his deportation had been entered on April 25, 1952 (R. 73–75, 77–78). In this notice, it was stated that arrangements were being made to effect the deportation and, when those were completed, petitioner would be notified when and where to present himself for deportation. The notice continued with a setting forth of the statutory imposition of a penalty upon an alien guilty, *inter alia*, of willful failure or refusal to depart from the United States within six months or to make timely application for necessary travel documents, and concluded with the warning (R. 75):

> Therefore, you will recognize the importance of making every effort in good faith to obtain passport or other travel documents so that you may effect your departure pursuant to the said order of deportation within the time prescribed by the quotation above from the Internal Security Act of 1950.[2]

At the time of this notice, petitioner was associate editor of a newspaper printed in the Finnish language at Superior, a city located "practically together" with

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[2] The text of the letter was as follows, the brackets indicating words not read to the jury (R. 74–75; Ex. 6):

"An order, of which you have been notified, directing your deportation from the United States was entered on April 25, 1952, on the following grounds:

"'The Immigration Act of May 26, 1924, in that, at the time of entry, he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder; and

"'The Act of October 16, 1918, as amended, in that he was, after entry, a member of the following class set forth in

Duluth, where the field office of the Immigration Service was located (R. 78–79).

At the trial, the Officer-in-Charge of the Duluth office testified that petitioner failed to depart (R. 84). The officer did not know, and would not necessarily know, of any steps by the government to obtain travel documents (R. 82–83). He testified that a

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Section 1 of said Act: An alien who was a member of the Communist Party of the United States.'

"Arrangements to effect your deportation pursuant to such order are being made and when completed you will be notified when and where to present yourself for deportation.

"In this connection you are reminded that Section 23 of the Internal Security Act of 1950, which was enacted by Congress on September 23, 1950, declares that any such alien 'who shall willfully fail or refuse to depart from the United States within a period of six months from the date of such order of deportation, or from the date of the enactment of that Act 'whichever is the later, or shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure, or who shall connive or conspire, or take any other action, designed to prevent or hamper or with the purpose of preventing or hampering his departure pursuant to such order of deportation, or who shall willfully fail or refuse to present himself for deportation at the time and place required by the Attorney General pursuant to such order of deportation, shall upon conviction be guilty of a felony [and shall be imprisoned not more than ten years]. Provided, that this subsection shall not make it illegal for any alien to take any proper steps for the purpose of securing cancellation of or exemption from such order of deportation or for the purpose of securing his release from incarceration or custody: * * *'

"Therefore, you will recognize the importance of making every effort in good faith to obtain passport or other travel documents so that you may effect your departure pursuant to the said order of deportation within the time prescribed by the quotation above from the Internal Security Act of 1950."

Canadian passport was presented to petitioner after the six months' period; that petitioner could have proceeded to Canada;[3] and that petitioner's Canadian citizenship was not terminated until after the six months' period for petitioner's departure (R. 85-87). The Officer-in-Charge also testified that he had directed a subordinate, Maki, to obtain, during the six months' period after the entry of the final deportation order against petitioner, "data concerning his birth and so forth" for the file, to be sent to the District Director of the Immigration and Naturalization Service at Chicago (R. 88–89).

Maki testified that on or about April 18, 1952, he interviewed petitioner for data to be recorded on a passport data form (R. 126). Maki informed petitioner that the form would be sent to Chicago to be considered by the Service with a view toward the Service's obtaining travel documents, which it sometimes did (R. 128, 138–139, 144–145), but he also testified that the obtaining of the information did not necessarily mean that the Service would follow through and obtain or attempt to obtain travel documents (R. 129). Maki said nothing to petitioner to indicate that the government would apply anywhere for a passport. He was in no position to do so. (R. 130–135, 140–142.)

John J. Boldin, an investigator for the Immigration and Naturalization Service, testified that when the six months' period expired in October 1952, and peti-

[3] Only nominal additional papers apparently would have had to be obtained. See R. 140–141.

tioner, pursuant to the statute,[4] was placed under the supervision thereafter required, Boldin inserted in the supervision order a provision requiring petitioner to report on his efforts to effect departure from the United States (R. 122). Petitioner did not comply with this provision of the order of supervision and at no time reported such efforts (R. 122).

Boldin further testified that on February 12, 1953, he interviewed petitioner with respect to his failure to comply with the notice of April 30, 1952, requiring departure from the United States by October 25, 1952 (R. 93–94, 99, 101). The questions and petitioner's answers were transcribed at the time into a statement sworn to and signed by petitioner, and introduced in evidence at the trial (Ex. 8; R. 94–95). In his answers, petitioner asserted that he had understood from his prior interview with Maki that the government, and not he (petitioner), would obtain the travel documents and that petitioner would not need to do anything until he heard from the government (R. 102–106). He admitted that he had never received a request from the government to execute any passport application and that he had "been wondering about that myself" (R. 104).

The trial judge instructed the jury *in extenso* on the required element of willful intent (see the Argument, *infra*, pp. 26–27). He refused petitioner's request to instruct that petitioner's continued presence in the United States was not "evidence" of guilt,

[4] Section 23 of the Internal Security Act of 1950, 64 Stat. 1010, now included in Section 242 of the Immigration and Nationality Act of 1952, involved in *United States* v. *Witkovich*, 353 U. S. 194.

stating that it "is not proof of his guilt, but it is evidence" (R. 157).

Petitioner was sentenced to five years' imprisonment on the first count (R. 180). On the second count, imposition of sentence was suspended until after service of the sentence imposed on the first count (R. 180), the trial court indicating probable grant of probation for time in which to effect departure if petitioner then made a genuine effort to depart (R. 175–176).

SUMMARY OF ARGUMENT

I

Petitioner contends that the instant enactment is unconstitutional because it does not afford, *inter alia*, a jury trial of the question whether petitioner committed the acts upon which he was ordered deported. The contention misconceives the nature of the statute, which in no sense punishes the acts for which petitioner was ordered deported but comes into effect only after the administrative proceedings to determine deportability have been completed and petitioner's status of deportability established. Thereafter, if petitioner willfully refuses to abide by the result of the deportation proceedings—if he willfully fails to depart from the United States or willfully fails to make timely application in good faith for travel documents—he is subject to penalty, as is the case in many instances of the violation of proper administrative orders that are not based upon jury verdicts, *e. g.*, denial of licenses, selective service

board classifications, Interstate Commerce Commission rate findings, and the like.

Petitioner was accorded a full jury trial as to whether he willfully failed to seek travel documents and willfully failed to depart. Moreover, he was accorded a thorough review, by the trial judge, on the question of whether the administrative proceedings in which he was held to be a deportable alien were valid[5]—thereby making inapplicable the basic premise of the dissent in *United States* v. *Spector*, 343 U. S. 169, 174 (upon which petitioner places such reliance), which assumed that there would be no judicial review of the deportation order. Accordingly, the statute, as applied here, was clearly within the established and familiar concept in criminal law that a status—as here, deportability—may be established administratively, and may thereafter be flouted only at the risk of criminal consequences. The inquiry in the criminal trial is not a retrial of a completed civil determination, but is addresed only to the question whether a law imposing certain duties upon a person in a specific civil status has been willfully disobeyed. It is this criminal disobedience that is the subject of jury trial.

II

Petitioner contends that the statute does not apply to him because it refers to a person ordered deported under "the Act of October 16, 1918, as amended (40 Stat. 1012; 41 Stat. 1008; 54 Stat. 673; 8 U. S. C. 137)," and petitioner was found deportable under the

[5] In this Court, petitioner does not challenge the validity of the deportation order.

1950 amendment to the 1918 Act, printed at 64 Stat. 1010. The answer is that the amendment under which petitioner was found deportable was made in a section of the same statute here involved—Section 22 amended the 1918 Immigration Act to make members of the Communist Party deportable, and Section 23 required their departure. At the time of the enactment, of course, there was not yet an available citation in the statutes-at-large to be printed later (64 Stat. 1010), but the absence of this parenthetical citation does not negate the controlling effect of the language "the act of October 16, 1918, *as amended* (emphasis added)." At the time when Section 23 (the departure provision) came into effect, the 1918 Act was amended to cover the deportation of Communist Party members. And the legislative history of the enactment supports this construction.

III

The trial court's instructions placed the issue of willfulness before the jury and the evidence warranted the jury's finding of guilt. Petitioner, who did not take the stand, argues that the jury should have believed that he thought the government would obtain the travel documents for him and that he had no duty under the statute until he was furnished documents by the government. The argument is based, in essence, upon one paragraph of a government notice of the deportation order and upon petitioner's later self-serving statements to a government investigator in which petitioner sought to excuse his non-performance by expressing the belief that the government was first

to obtain documents for him, and that he was not required to take any action.

As against the foregoing, the jury had before it (1) the terms of the notice for the jury's own appraisal of whether it contained any real ambiguity that would confuse a person sincerely intent upon compliance, and the jury also had before it (2) the evidence that petitioner could have resolved any ambiguity in the notice by inquiry at the nearby office of the Immigration Service, (3) the testimony of government witnesses that nothing had been said to lead petitioner to assume that possible efforts the government might itself make to deport him would absolve him of his own duty imposed directly by statute, (4) testimony that a Canadian passport had been presented to petitioner (after the six months' period) upon which he could have proceeded with only nominal additional papers, and that he did not use this passport although there was time to do so, and (5) evidence that after direct notification to petitioner (after the six months' period) that he could not merely await government action and must make periodic reports of his own efforts to obtain travel documents, he still made no reports of any such efforts.

The jury could properly conclude that petitioner, an experienced, literate, mature man, was not confused by the original notice or any earlier interview but was willfully choosing every possible delay and eschewing sincere effort at compliance, thereby testing the outermost limits of possible escape by means of later excuses.

The foregoing evidence also disposes of petitioner's contention that he was convicted on the basis of his own uncorroborated "confession." Petitioner made no confession, and he did not take the stand. The fact that he failed to depart was at no point in dispute. The evidence on the only real issue at the trial—as to whether he truly thought he was under no duty to do anything until he heard from the government—was developed in the direct testimony of the government's witnesses. Far from being evidenced by petitioner's statement to the Immigration Service investigator (which petitioner calls his "confession"), such willfullness was denied by petitioner at every point in that statement. The conviction rested, not upon petitioner's self-serving effort at excuse, but upon the jury's obvious disbelief in the excuses in the light of the circumstances attested by the government witnesses.

IV

Petitioner seeks to treat both the failure to depart and the failure to seek travel documents as a single offense. This misconceives not only the statutory language—which clearly employs the disjunctive "or"—but also the separate evils involved and referred to in the legislative history. The statute specifies four offenses, each embodying a separate evil: (1) willful refusal *or failure* to depart, "or" (2) willful refusal *or failure* to make timely application for necessary travel documents, "or" (3) connivance or action to hamper departure, "or" (4) willful refusal *or failure* of the alien to present himself for deportation at the time and place required by the

Attorney General. Petitioner was convicted of the first two offenses. The first offense, the failure to depart, embodies the evil of continued presence in the United States after it has been validly determined that such continued residence is detrimental or dangerous. That offense may be committed without involving the second offense of failure to apply for documents, since documents may be obtained by the government, or may be unnecessary in a given case, and yet the alien may elude the government at the last moment and fail to depart. But when the alien also fails to take the laboring oar of obtaining the necessary documents, he not only continues a detrimental or dangerous presence in the country, but also subjects the government to effort and expense and to a possibility—as the legislative history demonstrates—of outright failure to obtain documents at all. Accordingly, petitioner's second offense involved an additional and different type of injury to the United States and was properly the subject of separate indictment and conviction.

V

Petitioner's attack upon the sentence, as "savage" and as ignoring the statutory provisions permitting the judge to suspend sentence, is answered by the fact that the trial judge, at the time of sentencing, while specifically adverting to factors of special willfullness on the part of petitioner, did actually suspend sentence as to one of the counts. Moreover, the sentence was for five years, far short of the permissible 10 years, thus posing no situation of a sentence "so severe and the offense so trivial" as to warrant setting

aside by this Court. *Kawakita v. United States*, 343 U. S. 717, 745.

ARGUMENT

I

CONGRESS MAY CONSTITUTIONALLY IMPOSE PENALTIES, SUBJECT TO TRIAL BY JURY, UPON ALIENS ORDERED DEPORTED WHO FAIL TO COMPLY WITH CERTAIN STATUTORY REQUIREMENTS EVEN THOUGH THE STATUS OF DEPORTABILITY IS DETERMINED IN ADMINISTRATIVE PROCEEDINGS SUBJECT TO REVIEW BY THE COURT ALONE

Petitioner was accorded a full trial by jury as to whether he committed the offenses upon which the instant statute imposes a penalty, *i. e.*, whether he willfully failed to make timely application for travel documents necessary to his departure from the United States, and whether he willfully failed to leave the United States within six months of the deportation order. Moreover, at the trial, the administrative proceeding which resulted in the order of deportation was fully revieved by the trial judge in accordance with the prior decision of the Court of Appeals in *United States v. Heikkinen*, 221 F. 2d 890 (C. A. 7). Petitioner does not argue that, if the statute under which he was order deported is constitutional,[6] the deci-

[6] The constitutionality of the Internal Security Act of 1950 providing for the deportation of any alien who had been after entry a member of the Communist Party was upheld in *Galvan v. Press*, 347 U. S. 522. There is no claim that petitioner was merely a "nominal" member of the Party within the exception noted in *Galvan*, nor could there be in the face of his extensive activities in the Party. The case is thus materially different from *Rowoldt v. Perfetto*, No. 5, this Term, where the assertion is that Rowoldt was a nominal member of the Party.

sion upholding the deportation order is erroneous.[7] The contention is that the statute is rendered unconstitutional by the fact that the validity of the deportation order is not passed upon by the jury.

The argument rests upon an assumption that the offense consists of two elements—first, the act upon which the deportation order is based, and, second, the failure to apply for documents or to depart—and that both elements must be found against a defendant by the jury. This assumption is fundamentally in error. The offense does not consist in being declared deportable or in doing the act for which the alien is to be deported, but rather in certain willful conduct on the part of an alien against whom a valid order of deportation is already outstanding. The order of deportation must of course be a valid one, but the crime is action or non-action by the alien subsequent to, and quite separate from, the deportation proceeding. The act which is the ground for deportation may or may not be some criminal offense of another type. But in any event it is not an integral part of the instant criminal offense. An alien to whom the statute applies may remain in the United States for years without violating this statute, so long as he does not "willfully" fail to take measures toward departure. Conversely, when there is willful flouting of the law,

[7] In the Court of Appeals below, petitioner contended that the record of the deportation proceedings examined by the trial judge was defective and that petitioner was deprived of his right to counsel in the deportation proceedings by reason of failure to grant further continuances or to move the proceedings from Duluth to New York. The Court of Appeals considered these contentions at length and found them without merit (R. 220–223). Petitioner has not pursued these contentions before this Court.

the criminal trial of this specific offense is not the proper occasion for a collateral re-trial, by a jury, of civil issues properly determined, previously, in the administrative proceeding.

The dissenting opinion in *United States* v. *Spector*, 343 U. S. 169, 174, on which petitioner relies, assumed that a narrow interpretation of the Act would be employed, *i. e.* (343 U. S. at 177):

> Production of an outstanding administrative order for his deportation becomes *conclusive* evidence of his unlawful presence and a consequent duty to take himself out of the country, *and no inquiry into the correctness or validity of the order is permitted.* [Emphasis added.]

The difficulty envisaged by that statement is met by the interpretation (adopted below) that there is judicial review, although not by the jury, of the administrative proceeding at the trial in order to determine that the status of deportability was validly created. See *supra*, pp. 17–18. Moreover, in its citation of *Wong Wing* v. *United States*, 163 U. S. 228, the *Spector* dissenting opinion fails, we submit, to give adequate weight to the factor of willfulness in this statute and the necessity that willfulness be found by a jury. Under the statute involved in *Wong Wing*, the question of whether an alien willfully violated regulations was never to reach a court, but was to be decided entirely by a commissioner. The mere entry of an order of unlawful residence resulted, under that statute, in virtually automatic and immediate imposition of imprisonment and "infamous punishment at hard labor" (163 U. S. at 237). No judicial review at

all of the administrative order was provided or contemplated. Here, not only is there judicial review of the administrative proceeding, but there can be no penalty until a jury finds that failure to depart or failure to take the other requisite measures is willfully done. The administrative finding in the deportation proceeding does not result in punishment. The defendant's willful act after the administrative finding, as found by the jury, is the basis of punishment. There is a fundamental difference between a provision under which an administrative finding automatically imposes punishment, and statutory provisions, as in this case, properly granting authority for the administrative determination of liability or status (with provision for court review), then imposing duties relevant to that liability or status, and providing for criminal punishment only upon a judgment in a criminal trial that those specific duties have been willfully violated.

It is an established and familiar concept in criminal law that a status, liability, or duty may be established administratively, to be followed by criminal consequences in the event of subsequent acts or omissions by the person affected. Where the legislature has the power to invoke the administrative process—as it has with respect to deportation—such criminal legislation has not been deemed subject to challenge on the ground that the crimes associated with the specific status rest upon the original administrative determination. For example, a person denied a driver's license could not lawfully take it into his own hands to drive without a license because the denial was by an administrative body and he was of the view that the

denial of his application was unlawful. The same is, of course, true of other licenses and other statuses determined by administrative action. An important situation analogous to the present case is presented by selective service prosecutions. Hundreds of thousands of draft classifications have been established by administrative determinations, but the refusals to comply with the requirements of those classifications have been made crimes by statute. The validity of this pattern was upheld in *Cox* v. *United States*, 332 U. S. 442, 453, where this Court observed:

> * * * The concept of a jury passing independently on an issue previously determined by an administrative body or reviewing the action of an administrative body is contrary to settled federal administrative practice; the constitutional right to jury trial does not include the right to have a jury pass on the validity of an administrative order. * * *.

Freight tariffs or price controls established by administrative proceedings have long been upheld. In *Yakus* v. *United States*, 321 U. S. 414, 444–445, this Court stated:

> * * * [W]e are pointed to no principle of law or provision of the Constitution which * * * precludes the practice, in many ways desirable, of splitting the trial for violations of an administrative regulation by committing the determination of the issue of its validity to the agency which created it, and the issue of violation to a court which is given jurisdiction to punish violations. Such a requirement presents no novel constitutional issue.
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> * * * * * *

> For more than fifty years it has been a penal offense for shippers and interstate rail carriers to fail to observe the duly filed tariffs fixing freight rates—including, since 1906, rates prescribed by the Commission—even though the validity of those rates is open to attack only in a separate administrative proceeding before the Interstate Commerce Commission. 49 U. S. C. §§ 6 (7), 10 (1); *Armour Packing Co.* v. *United States*, 209 U. S. 56, 81; *United States* v. *Adams Express Co.*, 229 U. S. 381, 388. It is no defense to a prosecution for departure from a rate fixed by the filed tariffs that the rate is unreasonable or otherwise unlawful, where its infirmity has not first been established by an independent proceeding before the Interstate Commerce Commission, and the denial of the defense in such a case does not violate any provision of the Constitution [citing decisions]. * * *[8]

There is, accordingly, no constitutional objection to the imposition of duties or consequences on persons

[8] Other illustrations are not wanting, of course, for the principle that, where criminal consequences follow from failure to comply with the duties and requirements flowing from a particular status which has been administratively determined, it is not for the jury to pass upon the validity of such requirements or status. For example, rulings by the Federal Communications Commission and the Civil Aeronautics Board, violations of which may result in criminal action, are reviewable solely by the courts (47 U. S. C. 402, 502; 49 U. S. C. 622, 646). See also, *e. g.*, 18 U. S. C. 835 (transporting explosives contrary to regulations promulgated by the Interstate Commerce Commission, see *Boyce Motor Lines* v. *United States*, 342 U. S. 337); 18 U. S. C. 41 (hunting and fishing not in compliance with rules and regulations adopted under authority of law); 18 U. S. C. 1383 (entering upon or otherwise violating restrictions applicable to a military area or zone).

in a status fixed by administrative proceedings; and the imposition of penalties for failure to perform these duties would be seriously impaired if the enforcement of these requirements were conditional, as to each penalty, upon a jury retrial of the civil issues theretofore determined in the administrative proceeding.[9]

II

PETITIONER, AS AN ALIEN REQUIRED TO BE DEPORTED UNDER THE "ACT OF OCTOBER 16, 1918, AS AMENDED," IS NOT ABSOLVED FROM DEPORTATION BY AN OMISSION FROM A PARENTHETICAL LISTING OF AMENDMENTS OF THE 1918 ACT

Petitioner contends that the 1950 enactment cannot be applied to him since it refers to a person ordered deported under "the Act of October 16, 1918, as amended (40 Stat. 1012; 41 Stat. 1008; 54 Stat. 673; 8 U. S. C. 137)," whereas he was ordered deported under the 1950 amendment to the 1918 Act printed at 64 Stat. 1010. The quoted language is from Section 23 of the Internal Security Act of 1950 which, in the immediately preceding Section 22, enacted the amendment to the Act of October 16, 1918, under which petitioner was ordered deported *i. e.*, the amendment adding Communist Party membership as an additional ground of deportation. Of course, the amendment

[9] Cf. *Maggio* v. *Zeitz*, 333 U. S. 56, to the effect that it would be improper to attempt to relitigate or correct a bankruptcy turnover order when it later became the basis of a contempt proceeding, despite the contention that the turnover order and subsequent imprisonment was based only upon ordinary evidence rules and not upon proof beyond a reasonable doubt (but see separate opinion of Mr. Justice Black and Mr. Justice Rutledge, 333 U. S. at 78–81).

effected by Section 23 did not have, at the time of enactment, any citation to a page in the statutes-at-large such as is cited for prior amendments in the parentheical clause on which petitioner relies. But this does not mean that, when Congress spoke of persons deported under the Act of October 16, 1918 "as amended", it did not include an amendment then being contemporaneously enacted. Section 22 (64 Stat. 1006) specifically states "The Act of October 16, 1918 * * * be, and the same is hereby, amended" (to make Communist Party members deportable). The duty to depart appears in the immediately subsequent Section 23 (64 Stat. 1012), and its reference to "the Act of October 16, 1918, as amended" patently includes all amendments including that embodied in the very same statute.

That the government's interpretation constitutes the normal reading is attested by the experienced compilers of the United States Code. The section is codified in Section 156 (e) of 8 U. S. C. (1946 ed. Supp. IV) as imposing a penalty for failure to deport "Any alien against whom an order of deportation is outstanding under (1), section 137 to 137–8 of this title * * *." In turn, Section 137–3, in conjunction with Section 137 (2) (c), provides for deportation on the basis of Communist Party membership. The same interpretation appears in Supplement V of the 1946 Code, and in the present legislation—the Immigration and Nationality Act of 1952 (8 U. S. C. (1952 ed.) 1251 (a) (6) (C) (i), 1252 (e)).

The purposes of the legislation likewise demonstrate its proper construction. The provision for de-

portation of members of the Communist Party was added in order to close the loopholes in the earlier, more general, provisions with respect to deportation of subversive aliens. S. Rep. No. 2369, 81st Cong., 2d Sess. p. 10. It is unthinkable that an enactment to assure prompt departure of subversives from the United States—a provision referring to "subversives" in specific language elsewhere in the same sentence (*supra*, p. 3)—was intended to exclude Communist Party members merely because one citation of an amendment was omitted in a parenthetical reference to amendments accompanying the controlling language, "the Act * * * as amended." The reports of the congressional committees at no point indicate any limitation of the phrase "as amended" to any specific amendments, and certainly not to the pre-1950 amendments. See S. Rep. No. 2369, 81st Cong., 2d Sess., pp. 10, 12, 14; H. Rep. No. 3112 (Conference Report), 81st Cong., 2d Sess., pp. 54, 56, 60. In sum, neither the language nor the legislative history supports petitioner's contention.

III

THE TRIAL COURT'S INSTRUCTIONS ON WILLFULNESS WERE CORRECT, AND THE EVIDENCE WARRANTED A FINDING OF WILLFULNESS

A. THE INSTRUCTIONS ON WILLFULNESS WERE CORRECT

Petitioner contends that the instructions by the trial judge directed the jury to convict him without proof of willfulness or intent (Pet. Br. 31–34). The contention is answered by the instructions themselves.

The charge first included a verbatim quotation of the indictment and statute, embodying the word "willfully" no less than four times, and instructions on "reasonable doubt" (R. 164–165). The judge then instructed:

> The law presumes that every man intends the legitimate consequences of his own acts. Wrongful acts knowingly or intentionally committed can be neither justified nor excused on the ground of innocent intent.
>
> Before you may find the defendant guilty on Count One of the indictment, you must be satisfied from the evidence beyond all reasonable doubt that he, during the period of six months from April 9, 1952, did *willfully* fail to depart from the United States.
>
> Before you may find the defendant guilty on Count Two of the indictment, you must be satisfied from the evidence beyond all reasonable doubt that he, during the period of six months from April 9, 1952, did *willfully* fail to make timely application in good faith for travel or other documents necessary to his departure from the United States. [R. 166; emphasis added.]
>
> * * * * *
>
> You are instructed that the statute on which this indictment is laid, to-wit, Section 156 (c), Title 8, United States Code, the material parts of which I have read to you, places upon an alien against whom an order of deportation is outstanding, an affirmative duty and an obligation on his part to take specific steps toward effecting his own departure from the United States, and to that end to make timely applica-

tion for travel or other documents necessary to such departure. It is the alien's *willful* failure in that regard to fulfill such duty and obligation that is the gist of the offenses here charged.

"Willful" as used in this statute, means an intentional failure and refusal to comply with the order of deportation.

There is no duty on the part of the Government to assist the defendant in effecting his departure. The Government will, if requested, assist him. But the duty devolves upon the defendant to comply with that order of deportation.

As I say, the material parts of the statute I have read to you place upon an alien against whom an order of deportation is outstanding an affirmative duty or obligation on his part to take specific steps toward effecting his own departure from the United States. In other words, he can't remain idle. He must take the necessary steps to effect his departure from this country within that period of six months. And if he fails to do so, he has violated the law and the statute involved in this case. [R. 167–168; emphasis added.]

From the course of the trial, the jury understood that the only real issue in the case was whether petitioner knew that he had to go forward, himself, with the procurement of travel documents, or whether he sincerely believed that he could properly wait for the government to produce such papers. Under the instructions quoted above, the jury was apprised of the requirement that in order to hold petitioner guilty it must conclude that the first of these alternatives was his actual state of mind—

that his failure to seek travel documents and his failure to depart were willful and not innocent."[30]

B. THE EVIDENCE WARRANTED A FINDING OF WILLFULNESS.

Petitioner also urges (Pet. Br. 27–30) that the evidence does not show "willfulness," the basic conten-

[30] The cases cited by petitioner (Pet. Br. 27) disclose no insufficiency in the District Court's instructions concerning willfulness. *Felton* v. *United States*, 96 U. S. 699, is clearly distinguished by its showing of reasonable and extensive effort of certain distillers to comply with the statutory requirements as to equipment; it was held error to refuse an instruction that, if the inadequacy of equipment was "unknown" to the defendants, they were not liable (96 U. S. at 701, 704). *Spurr* v. *United States*, 174 U. S. 728, 736, 739, involved the refusal of a court to state to the jury the penal provision requiring *willful* violation of a statute prohibiting certification of a check when funds on deposit were insufficient; the judge was patently in error in stating that penal provisions were not for the jury's consideration. In *United States* v. *Murdock*, 290 U. S. 389, 396, a prosecution for withholding tax information, it was held error to refuse an instruction which would have permitted the jury to determine that the defendant asserted the privilege against self-incrimination in good faith and that, accordingly, information was not "willfully" withheld. In *Spies* v. *United States*, 317 U. S. 492, 495–497, 499, involving a willful attempt to evade tax, the Court relied upon the entire structure of the legislation as the basis for requiring something additional with respect to willfulness for the felony as distinguished from the willful misdemeanors. In the instant case, no such distinction is involved or is pertinent, as the statute lists four, equal, offenses. *Hartzel* v. *United States*, 322 U. S. 680, 687–689, held only that the diatribes against various races and against the President did not constitute evidence of the needed specific willful intent to foment insubordination in the armed forces. In *Screws* v. *United States*, 325 U. S. 91, 93, 107, the case of a fatal beating of a Negro whom the sheriff had threatened to "get," the instruction was held insufficient, not because of lack of requirement of a "generally" bad purpose, but for lack of a direction tieing that purpose to the specific offense—to deprive of a constitu-

tion being that "[i]n his statement which was introduced into evidence" petitioner explained that he thought the Immigration Service was procuring the documents for him (Pet. Br. 28).

The statement by petitioner which was "introduced into evidence" was introduced by the government, for petitioner did not take the stand. The argument is really that the jury was required to find misunderstanding, on his part, from the form of notice to depart that he received, and from the excuses he offered in his transcribed interview with an Immigration Service investigator (*supra*, p. 10). As against this claim of misunderstanding, the jury had before it (1) the words of the notice itself (*supra*, pp. 7–8, fn. 2); (2) the fact that petitioner could have resolved any ambiguity in the notice by inquiry at the office of the Immigration Service at Duluth, which was "practically together" with the twin city of Superior, Wisconsin, where petitioner resided (*supra*, pp. 7–8) (R. 78);

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tional right. *Ward* v. *United States*, 344 U. S. 924, was no ruling on instructions but a *per curiam* finding by this Court that the "record" did not support a charge of "deliberate purpose * * * not to comply with" the requirement of furnishing a correct address to the Selective Service Board. *Morissette* v. *United States*, 342 U. S. 246, 249–250, 273, involved a prosecution for stealing or "knowingly" converting government property. The trial judge refused to allow proof that the defendant thought the property had been abandoned and the Court of Appeals had ruled that knowing conversion required *no* element of criminal intent. By contrast, in the instant case, there was no barring of the indications of possible misunderstanding culled by petitioner from the government's evidence, and the instructions repeatedly embodied the requirement of "willful" disregard of the requirements that he obtain travel documents and leave the country.

(3) the testimony of government witnesses that nothing had been said to lead petitioner to assume that possible government efforts to deport him absolved him of his own duty, imposed directly by the statute (*supra*, pp. 9–10); (4) undisputed testimony that a Canadian passport had been presented to petitioner (after the six months' period) upon which he could have proceeded with only nominal additional papers;[11] (5) evidence that after direct notification to petitioner (in his order of supervision) that he could not merely await government action and must make periodic reports of his own efforts to obtain travel docu-

[11] Petitioner is in error in stating that the availability of Canada for petitioner's departure cannot support the verdict because it was on "incident" occurring after the 6 months' period of departure (Pet. Br. 36, fn. 11). Petitioner wrongly infers that he could not have departed to Canada *during* the 6 months' period. But the officer testified, "I had a Canadian passport that was presented to [petitioner], showing that he was a citizen and could have proceeded to Canada" (R. 85). While the exact date was not recalled, the officer firmly recalled that it was *after* the time within which petitioner was to obey the order to leave the United States (R. 87). Accordingly, since petitioner was still recognized as a citizen of Canada after the six-month period, he was *a fortiori* a Canadian citizen during the 6 months in which he was required to depart from the United States, and could therefore have gone to Canada during that time.

Petitioner is in further error in stating, in the same footnote, that "this incident occurred 'a considerable time after' the period covered by the indictment." What occurred "a considerable time after" was the time "when the passport was canceled" (R. 87), thereby again supporting the government's view of the actual chronology—that Canada's action to revoke petitioner's citizenship did not come until a considerable time after petitioner could still have gone to Canada, during the six months' period following April 1952, in compliance with his duty under the instant statute.

ments, he still made no such reports of any efforts (*supra*, pp. 9–10).

Weighing the text of the notice to depart against the foregoing evidence and against the undisputed fact that petitioner was a mature and literate man (*supra*, p. 7), the jury could properly conclude that petitioner was at no time confused by the notice or by his interview with the immigration representative. While the notice did refer to the government's efforts to obtain travel documents for petitioner, the major portion of the notice was addressed to the alien's own duties to proceed with effecting his departure. The notice directed attention, not alone to the offense of refusal to present one's self for deportation when the Attorney General had effected arrangements, but it also pointed out the penalty for the three further and distinct offenses of willful failure to depart, willful failure to make timely application for travel documents, and willful conspiracy to prevent or hamper the departure. The notice likewise embodied, in terms, the statute which clearly makes the distinction between *refusal* to make timely application for documents and *failure* to do so. And the last paragraph of the notice specifically stated (R. 75):

> Therefore, you will recognize the importance of making every effort in good faith to obtain passport or other travel documents so that you may effect your departure pursuant to the said order of deportation within the time prescribed by the quotation above from the Internal Security Act of 1950.

The jury could properly conclude from this letter (and the testimony as to conversations with peti-

tioner) that he was amply advised of his own responsibility to proceed, irrespective of concurrent government efforts in the same direction; and—particularly, in the light of the testimony of the government witnesses—the jury could well disbelieve, as mere self-serving excuses, petitioner's assertions to a government investigator that he (petitioner) had assumed that he could do nothing, and allow the government to carry out his statutory duty. Petitioner was no unschooled, bemused recent immigrant; he had lived the past 46 years in Canada and the United States and was, at the time, associate editor of a newspaper published in the Finnish language in Wisconsin. He was a citizen of Canada and could have obtained the simple travel documents to return to Canada well before that country, at a later time, expatriated him. He was quite capable of understanding that the Immigration Service was not required to elect between the alternatives of (1) efforts by the government to obtain travel papers *or* (2) action by the alien. The statute, which was furnished to him, speaks in terms of a dual and unequivocal duty of the alien to make every reasonable effort to effect his own departure *and* to cooperate in government efforts to that end if and when the government takes successful action in that respect.

Petitioner was, of course, not required to take this stand but, conversely, he cannot complain of the refusal of the jury to accept as absolute fact his indirect and self-serving protestations of misunderstanding. The jury, on all the evidence, could well have concluded that petitioner knew his obligation but was

electing to gamble upon a possible ambiguity in the notice, in an attempt to portray himself as innocently confused. The jury could reasonably have believed that petitioner eschewed sincere efforts to obey the statute, choosing instead to chance the possibility of avoiding the penal consequences by later excuses of misunderstanding. In this view, his criminal involvement was not the product of ambiguities but of his own gamble in testing the outermost limits of the statute and the notice before him. As was said in *United States* v. *Wurzbach*, 280 U. S. 396, 399:

> * * * Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk. * * *

See also *Boyce Motor Lines* v. *United States*, 342 U. S. 337, 340.

C. PETITIONER'S CONVICTION DOES NOT RUST UPON HIS OWN STATEMENTS BUT UPON FACTS PROVED BY THE GOVERNMENT'S WITNESSES

The foregoing discussion of the evidence likewise disposes of petitioner's further contention that he was convicted upon his own uncorroborated "confession" (Pet. Br. 34–36). We have already stressed that petitioner made no confession. The fact that he failed to obtain documents and failed to leave the United States was at no point in dispute. The only real issue was whether he acted *willfully*—whether he understood that he was himself under the duty to take these steps. As shown in the preceding section

of this brief, the evidence on this question was developed through the direct testimony of government witnesses. Far from being evidenced by petitioner's statement to the Service investigator, it was denied by petitioner at every point. The conviction rested not upon petitioner's statement but upon disbelief in that statement, in the light of all the circumstances proved by the government witnesses who were believed. Petitioner is wholly wrong in saying that there was no evidence of guilt other than his statement.

IV

THE STATUTE SPECIFIES, AND PETITIONER COMMITTED, SEPARATE OFFENSES OF WILLFUL FAILURE TO DEPART FROM THE UNITED STATES PURSUANT TO THE DEPORTATION ORDER, AND WILLFUL FAILURE TO APPLY FOR TRAVEL DOCUMENTS

Petitioner contends that willful failure to depart and willful failure to obtain travel documents are separate offenses covering different contingencies, and that the former cannot exist in the presence of the latter (Pet. Br. 24–27). On this basis, he argues that the statute has been applied so as to multiply penalties for one action (Pet. Br. 24).[12] But his position clearly has no merit.

A. The two offenses, separated in the statute by the disjunctive "or", have different elements. An alien may depart informally, without travel documents. On the other hand, an alien may obtain travel documents and not depart. Each portion of the statute

[12] The court suspended imposition of sentence on the second count charging willful failure to apply for travel documents. *Supra*, p. 11.

thus punishes separate acts. And the legislative history shows, we think, that Congress intended each such act to be separately punished.

The purpose of imposing a duty to make timely application for documents was to avoid or minimize the necessity of the government's having to expend time and effort to get the departure under way. Moreover, it was known that personal efforts of the alien to obtain documents were sometimes more likely to be successful (especially with some countries) than efforts of the United States government. As observed by the Commissioner of Immigration and Naturalization at the congressional hearings, aliens often could arrange to leave the United States even when their governments had refused to issue travel documents at the request of the United States. Hearings on H. R. 10, before Subcommittee 1, House Judiciary Committee, 81st Cong., 1st Sess., p. 9. And see H. Rep. No. 1192, 81st Cong., 1st Sess., p. 8; S. Rep. No. 2239, 81st Cong., 2d Sess., p. 7; 96 Cong. Rec. 10675; Hearings on S. 1832 before the Subcommittee on Immigration and Naturalization of the Senate Judiciary Committee, 81st Cong., 1st Sess., p. 326.[13] In short, the

[13] H. Rep. 1192, 81st Cong., 1st Sess., p. 8; S. Rep. 2239, 81st Cong., 2d Sess., p. 7:

"The second case is that of Badrig Selian, 50, a native of Turkey. He is an active member of the Communist Party and one of their most important publicists in the United States. In 1930 his deportation was ordered but refused by Turkey and by Syria, which now controls his birthplace. Of his own free will he left the United States last year after the Government had failed throughout 18 years to get him out of the country. Concerning the Selian case the Attorney General says that—'this Communist declined to leave the

legislation was to give alien deportees, who would otherwise "make no effort to obtain the necessary papers," an "incentive to find a country which would be willing to have them" (96 Cong. Rec. 10453).

Petitioner's failure to apply anywhere was thus a separate offense, susceptible of subjecting the government to effort and expense and to eventual failure in deporting him. This offense might have been petitioner's only offense had the government succeeded in finding documents for him despite his own inactivity, or had he simply returned to Canada as informally as he had entered the United States. The element of actual departure or non-departure is no part of the offense of failure to apply for travel documents.

Conversely, the failure to depart is itself the decisive element of a separate offense. Assuming that it was impossible for petitioner to depart within six months because of his failure to apply for documents, that impossibility could be no excuse for failure to depart if he himself created the impossibility as a means of preventing his departure. Had petitioner

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United States, and since no country of origin would take him we were obliged to permit him to remain here at large. When it suited his own purposes, however, he was able through his own efforts to obtain a passport.'"

96 Cong. Rec. 10675, Representative Hobbs:

"* * * although in one case 13 applications of your Government were turned down flat, cold, and then a few months later when the man himself applied he got it in 5 days."

Hearings on S. 1832 before the Subcommittee on Immigration and Naturalization of the Senate Judiciary Committee, 81st Cong., 1st Sess., p. 326:

"Attorney General Clark. * * *

"Since April 1, 1948, nine other persons known to be subversives who were under warrants of deportation have departed from the United States at their own expense."

as willfully made it impossible for him to depart, by means of an injury to himself or by a destruction of documents obtained by the government, this impossibility, like that in the instant case, would not only be the product of some other offense (*e. g.*, willful destruction of government papers) but also a step in the offense of failing to leave the United States. The single act of failure to make timely application can be an offense in itself and also a part or all of the different offense of complete failure to depart from the United States.

The full context of the statute shows the separate nature of the offenses which it creates. As pointed out by the court below (R. 225), "Section 156 (c) defines four specific, different acts or omissions to act as constituting a crime: (1) willful failure or refusal to depart; (2) willful failure or refusal to make timely application in good faith for necessary travel documents; (3) connivance or conspiracy or any other action, designed to prevent or hamper the alien's departure, or with the purpose of so doing; and (4) willful failure or refusal of the alien to present himself for deportation as required by the Attorney General." All three of the offenses, other than willful failure to depart, are characteristized by a capacity for a separate type of injury, *i. e.*, an obstruction or addition of cost to the United States in ridding itself of the undesirable alien, as distinguished from the injury intrinsic in an undesirable alien's continued residence. For example, in the case of the fourth offense, had the Attorney General been successful in obtaining travel documents and had petitioner then

failed to present himself at the proper time, both the injury to the United States and the offense itself could have been an additional and separate matter—petitioner could have been guilty not only of refusal to depart, thereby imposing upon the United States the presence of an undesirable alien, but he could also have subjected the United States to embarrassment and expense in the retracting of arrangements and negotiations with a foreign country and a transportation line for petitioner's going to and entering the foreign country. The offense of failure to depart is penalized because it subjects the United States to the continued presence of an undesirable resident, while the remaining three offenses are separately and additional penalized because they cause separate and additional types of injury.[14]

B. The fact that one offense can also be part of another offense has long been recognized and upheld by this Court. This rule has not been changed by the recent decision in *Prince* v. *United States*, 352 U. S. 322, under its own stated limitations.[15] The

[14] Petitioner's conclusion that there was error in the instructions to the jury with respect to the relationship of the two offenses here involved (Pet. Br. 24–25) arises from his attention to the single paragraph of instructions which he quotes (Pet. Br. 24) and his overlooking of the prior precise language concerning each offense before the jury, at R. 164, 166. And see the remainder of the instruction at R. 168, from which petitioner quotes only a part.

[15] "[W]e are dealing with a unique statute of limited purpose and an inconclusive legislative history. It can and should be differentiated from similar problems in this general field raised under other statutes. The question of interpretation is a narrow one, and our decision should be correspondingly narrow." 352 U. S. at 325. And see 352 U. S. at 327–329.

decisions of this Court have held in essence, whether expressly articulated or merely implicit in the holding, that a separate punishment is established and is constitutionally permissible where each offense is penalized because of its causation of a different injury or evil. And this principle has been applied no matter how closely the offenses are related. The principle is most clearly illustrated in *United States* v. *Michener*, 331 U. S. 789 (summarily sustaining sentences for (1) causing a plate adapted for counterfeiting to be made, and (2) possession of that plate with intent to use it for counterfeiting) and in *Albrecht* v. *United States*, 273 U. S. 1 (sustaining convictions for possession of liquor—one step in the transaction—and sale—the completed transaction).[16] The separate nature of closely related offenses has been upheld in prosecutions for insulting a public official and for disorderly conduct involved in the same incident (*Gavieres* v. *United States*, 220 U. S. 338); for making a single sale of narcotics in violation of the order form and original stamped package provisions of the Harrison Act (*Blockburger* v. *United States*, 284 U. S. 299, 303–304); for conspiring to commit an offense and for committing the offense, even though the substan-

[16] In *King* v. *United States*, 280 U. S. 521, this Court affirmed, *per curiam*, on the authority of the *Albrecht* case, a decision of the Circuit Court of Appeals for the Ninth Circuit (31 F. 2d 17) holding that a conviction of the offense of selling morphine not in or from the original stamped package is not a bar to a subsequent prosecution for the offense of shipping morphine in interstate commerce, without having registered or paid the special tax; even though the same morphine was involved in the two cases—the two offenses being perfectly distinct as a matter of law.

tive offense may be the overt act of the conspiracy (*Carter* v. *McClaughry*, 183 U. S. 365, 394–395; *Pinkerton* v. *United States*, 328 U. S. 640, 643–644); for conduct unbecoming an officer and for conspiracy to defraud and the causing of fraudulent claims to be made, "although to be guilty of the latter involves being guilty of the former" (*Carter* v. *McClaughry*, 183 U. S. 365, 395); for agreeing to receive proscribed compensation and for receiving such compensation (*Burton* v. *United States*, 202 U. S. 344, 377–378); for breaking into a post office with intent to commit larceny and for committing larceny at the post office (*Morgan* v. *Devine*, 237 U. S. 632); for homicide, where the accused had been convicted of assault and battery before the death of the injured person (*Diaz* v. *United States*, 223 U. S. 442, 448–449); for making a false entry in the books of a bank, showing a credit, and later making a false entry in a report of the condition of the bank showing the same credit (*United States* v. *Adams*, 281 U. S. 202, 204–205). More recently, this Court stated in *Korematsu* v. *United States*, 323 U. S. 214, 222, that wartime administrative orders, concerning residents of Japanese descent, constituting "separate steps in a complete evacuation program," established separate duties and that disobedience of any one order would constitute a separate offense. And in *American Tobacco Co.* v. *United States*, 328 U. S. 781, 788, the Court held that conspiracy in restraint of trade was an offense separate from a conspiracy to monopolize under Sections 1 and 2 of the Sherman Act.

In *Prince*, where the crime of entry could be committed by "walking through an open, public door [of a bank] during normal business hours." 352 U. S. at 328), the mere entry, if the robbery itself was completed, added nothing of injury. This factor distinguishes that case from the instant one where, as we have shown, the offense of failing to apply for travel documents could subject the government to the need of taking the laboring oar as to documents, irrespective of the further separate injury of an undesirable alien's continuance in residence in the United States. The failure to seek the documents would accordingly add another element of injury, which the Congress has here specifically subjected to additional penalty.

Petitioner's misconception of the nature and objective of requiring the alien to obtain the travel documents leads him into the further error of arguing that he should have been permitted, at the trial, to explore the government's efforts to obtain travel documents (Pet. Br. 34). The efforts imposed upon the government by petitioner's total do-nothing attitude were of no avail in excusing his failure to act, for, as properly pointed out by the trial judge, the statute imposed the duty to seek the documents upon the alien, and not upon the government (*supra*, pp. 2–3, 27). Even had there been a total failure of the government to obtain travel documents—obviously not the case here (*supra*, p. 9 and fn. 3, and p. 30, fn. 11)—that would still have constituted no excuse for petitioner's failure to act, for the legislative history disclosed instance after

instance where aliens were successful in obtaining entrance to countries which would not heed the applications of the United States government for documents (*supra*, pp. 35–36).[17]

V

THE TRIAL COURT CLEARLY CONSIDERED THE POSSIBILITY OF SUSPENSION OF SENTENCE, AND DID NOT ABUSE ITS DISCRETION IN IMPOSING SENTENCE ON ONE COUNT WITHOUT SUSPENSION

Petitioner's final contention, that the court's sentence was "in disregard of the statutory standards" of the suspension provisions and violated the statute's "policy" of mercy (Pet. Br. 17, 36–38), is not valid on the facts of the case. The statute's proviso (*supra*, pp. 3–4) that the judge "may" suspend sentence imposes no mandate to suspend. Moreover, the judge was aware of the available discretion, for he suspended imposition of sentence on one of the counts (R. 180). The discussion at the time of sentence discloses a clear basis for the judge's refusal to suspend sentence on the other count, a discussion especially pertinent to the portion of the statute establishing the fourth criterion of suspension, *i. e.*,

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[17] Petitioner's initial argument that the evidence does not show a failure to apply for travel documents (Pet. Br. 21–23) rests upon the basic misconception that he was free not to make any efforts, apart from those made by the government, to obtain travel documents. Since petitioner made no such efforts at all, he cannot properly urge (as he does) that he was convicted because he obtained the wrong papers or failed to try to obtain the correct documents. On the evidence believed by the jury, this is a case of total disregard of the alien's obligations, not a case of sincere but misguided efforts.

(4) the character of the efforts made by such alien himself and by representatives of the country or countries to which his deportation is directed to expedite the alien's departure from the United States;

The judge pointed out the following (R. 174–176):

> [A]t one time this defendant had offered to him—this Court offered this defendant after he was indicted the opportunity to leave the country. He was then a citizen of Canada, and he could have gone to Canada at that time. But he refused that permission of the Court, and he just insisted upon staying.
>
> He has been in this country for all these years; he never became a citizen. While he was in this country he left, according to the record in this case, according to the deportation proceedings, he went back to Russia, he was over there for about three years, learning all he could about Communism; and then he came back here as one of their agents. He came back here without a passport. He left the country, and he came back and came in and went out without passports.
>
> He is the editor of a paper. He is an intelligent man. He knew what he was doing. * * *
>
> * * * I feel that he has simply defied the law—he has set himself up above the law. He just made up his mind that he was a little higher than the law of this country, and that he didn't have to obey it. Well, he is going to obey the law.

Considering that Congress permitted a maximum penalty of ten years for the offense, the court's im-

position of a five-year sentence, on the basis of the considerations discussed, is not reviewable. It is far short of a sentence "so severe and the offense so trivial that an appellate court should set it aside" (*Kawakita* v. *United States*, 343 U. S. 717, 745).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

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